

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERALD A. GARBER AND HANA R. GARBER	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 812767
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1987.	:	

Petitioners, Gerald A. Garber and Hana R. Garber, 75 Meadow Woods Lane, Lake Success, New York 11020, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1987.

On June 15, 1994 and June 28, 1994, respectively, petitioners, appearing by Moris Mostafiz, CPA, and the Division of Taxation appearing by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel) consented to have the matter determined on submission without a hearing. Documentary evidence was submitted by the Division of Taxation on August 11, 1994. Petitioners submitted documentary evidence and their brief on September 12, 1994. The Division of Taxation submitted its brief on October 25, 1994. Petitioners submitted their reply brief on November 10, 1994. After review of the entire record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of New York State personal income tax for the year 1987.

FINDINGS OF FACT

By a consolidated statement of tax liabilities dated April 12, 1990, the Division of Taxation ("Division") advised Gerald A. Garber and Hana R. Garber ("petitioners") of an outstanding personal income tax liability of \$14,618.05, plus penalty and interest, for a total

liability of \$21,279.40 for the year 1987.¹

By a letter dated November 25, 1990 (the letter was received by the Division's Audit Services Bureau on December 13, 1990), petitioners indicated that the full amount due (\$21,279.40) had been paid by check and further stated as follows:

"Please note the original tax assessed, \$14,618.00, had been paid via application of overpayment from 1986 to 1987 (copy of 1986 and 1987 income tax returns enclosed).

"After speaking to Tax Compliance over the phone, I was told that you never received the original IT-201 for 1986, so I'm enclosing a copy. Taxpayers never received a notice asking for the 1986 tax return nor did they receive a letter asking them about the application of \$60,000.00 estimated tax payment (copy enclosed) made to N.Y. State Income Tax.

"I'm also enclosing a copy of taxpayers' 1987 IT-201 showing there was an overpayment of \$14,617.00 from 1986 (Line 4, Page 1 Form IT-201)."

The letter also stated that the copy of the 1986 return was a recreation of the original filed by petitioners' prior accountant who refused to release a true copy of the return actually filed.

Along with the letter, petitioners submitted Form IT-113X, Claim for Credit or Refund of Personal Income Tax, dated November 25, 1990.

On June 28, 1991, the Division issued a Notice of Disallowance of petitioners' claim for refund which stated, in part, as follows:

"We have no record of a 1986 return being filed by you.

"New York State Tax Law does not permit us to allow the claim for refund. You should have filed your claim within three years from the date the return was due or two years from the date the tax was paid, whichever is later."

For the year 1987, petitioners filed a joint New York State Resident Income Tax Return. Total State income tax due was calculated to be \$17,050.00 (line 71 of return). This return was received by the Division on September 12, 1989 and was mailed in an envelope which bore a United States Postal Service postmark of September 11, 1989. On line 76 of the return,

¹The consolidated statement of tax liabilities in evidence herein was issued to Hana R. Garber. It is unclear whether an additional statement was issued to Gerald A. Garber as well. It should be noted that, for the year 1987, petitioners filed a joint resident income tax return.

petitioners indicated that they had paid estimated taxes in the amount of \$16,117.00 (total additional tax due, therefore, was \$933.00). In red ink, the \$16,117.00 figure was crossed out and "1500" was written on line 76 next to the crossed-out number. On lines 4 and 23 of their 1987 return, petitioners included (as income on line 4 and as a New York subtraction on line 23) taxable refunds of State and local income taxes of \$14,617.00.

With the documentation submitted to the Division of Tax Appeals on September 12, 1994, petitioners included a copy of their 1986 New York State return which they contend was prepared by their former accountant, Alexander Hollender, and which was not previously available for inclusion with their November 25, 1990 letter seeking a refund (see, Finding of Fact "2"). On the return, on line 73 thereof, it is indicated that estimated tax was paid in the amount of \$60,000.00. A copy of a check dated December 24, 1986 from Gerald A. Garber to New York State Income Tax in the amount of \$60,000.00 was also attached to the documents submitted by petitioners. The check bears a stamp and serial numbers evidencing receipt by the Division. The copy of the 1986 return indicates a filing status of "married filing separately on one return". Total tax due on line 68 of the copy indicates tax due of \$27,278.00 from petitioner Gerald A. Garber and tax due of \$18,105.00 from petitioner Hana R. Garber, or a total due from both petitioners of \$45,383.00. Subtracting this amount from estimated tax paid of \$60,000.00 results in an overpayment (claimed by petitioner Gerald A. Garber) of \$14,617.00. On line 78 of the copy of the 1986 return, petitioners indicate that this \$14,617.00 is to be applied to 1987 estimated tax.

Also included with petitioners' submission of documents to the Division of Tax Appeals are:

- (a) A copy of petitioners' 1986 Federal income tax return;
- (b) A record of 1987 estimated tax payments for Gerald Garber;
- (c) A check from Gerald A. Garber, dated April 15, 1987, payable to Alexander Hollender, CPA, in the amount of \$2,500.00 for "1986 taxes, etc."; and
- (d) Instructions for filing petitioners' 1986 Federal tax returns from Tanklow,

Hollender & Company, Certified Public Accountants, along with checks, dated April 10, 1987, payable to the Internal Revenue Service (one check was for petitioners' 1986 tax; the other for 1987 estimated tax).

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioners may be summarized as follows:

- (a) The first time petitioners were advised that the Division had not received their 1986 return was in 1990;
- (b) The information set forth on lines 4 and 23 of petitioners' 1987 return (see, Finding of Fact "4") was taken directly from their 1986 return;
- (c) Petitioners admit that they cannot prove that they filed their 1986 New York State return, but contend that the documentation submitted (copies of the return, the preparer's fee, instructions for filing and checks) show a timely filing; and
- (d) Petitioners paid \$60,000.00 in estimated tax payments for 1986 yet, despite allegedly never having received a return, the Division never contacted petitioners concerning application of this amount. Petitioners admit, in the letter of their representative dated September 1, 1994 (received September 12, 1994 along with their submission of documents) that when first advised that no return was filed for 1986, it was 1990, more than three years after the return was due and more than two years after the tax had been paid.

The position of the Division is as follows:

- (a) Petitioners had until April 15, 1989 to file a claim for refund for the 1986 tax year and the earliest document filed with the Division which could constitute a claim for refund for the 1986 tax year was the 1987 return filed in September 1989;
- (b) The instruction sheets and checks of April 10, 1987 related solely to petitioners' 1986 Federal returns and, therefore, do not prove timely filing of a 1986 New York return; and
- (c) The information set forth on lines 4 and 23 of petitioners' 1987 New York State

return show that they received a refund of \$14,617.00 from 1986.

CONCLUSIONS OF LAW

A. Tax Law § 687(a) provides, in pertinent part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

B. Tax Law § 687(i) provides as follows:

"For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment."

Accordingly, the \$60,000.00 estimated tax payment paid by check dated December 24, 1986 (see, Finding of Fact "5") is deemed to have been paid on April 15, 1987.

C. Petitioners admit that they cannot prove filing of a 1986 New York State income tax return. There is no evidence that a return from petitioners for 1986 was ever received by the Division. Absent proof of certified or registered mailing of that return, allegations by petitioners (including testimony which was absent herein) is insufficient to establish that the return was received by the Division (see, Matter of Schumacher, Tax Appeals Tribunal, February 9, 1995; Matter of Savadjian, Tax Appeals Tribunal, December 28, 1990).

Since it cannot be found herein that a return for 1986 was ever filed, the time limitation for a claim for refund or credit of the 1986 overpayment is, pursuant to Tax Law § 687(a), two years from the time the tax was paid. It is clear that petitioners paid \$60,000.00 in estimated tax for 1986 by a check dated December 24, 1986. Since that payment is deemed, by virtue of Tax Law § 687(i), to have been made on April 15, 1987, petitioners had until April 15, 1989 to file a timely claim for refund or credit.

As the Division correctly points out in its brief, the earliest document relating thereto which could constitute a claim for refund or credit of petitioners' 1986 overpayment was their 1987 return (all letters and formal refund claims were initially filed in November 1990) which

was not filed until September 11, 1989 (see, Finding of Fact "4"). There is no explanation in the record for the late filing of this return which was due on April 15, 1988. Had it been filed even within one year of its due date, it could have been accepted as a timely claim for refund or credit of the 1986 overpayment of \$14,617.00. While it is certainly unfortunate that the 1987 return was not filed on or before April 15, 1989 (since it is undisputed that petitioners overpaid their 1986 tax liability), the provisions of Tax Law § 687(a) are clear. Although it is for tax due for the year 1987 for which the actual refund is sought, the basis for this refund is an overpayment for 1986 which petitioners claim should have been applied to 1987 estimated tax payments. Therefore, since no claim was made until September 11, 1989, it must be determined that the Division's denial of petitioners' claim was proper.

While it does not affect the outcome of this matter, it should be pointed out that, as petitioners correctly assert, the Division has erroneously contended that the inclusion of the \$14,617.00 on lines 4 and 23 of their 1987 return is proof that petitioners received a refund of this amount. Per the State return, the information to be set forth on lines 4 and 23 is to be entered exactly as it appears on the Federal return filed for that year. The instructions for Federal Form 1040 state clearly that any part of a refund of State or local income taxes paid before 1987 which the taxpayer was entitled to receive in 1987 but chose instead to have applied to 1987 estimated State income tax is considered to have been received in 1987 and must, therefore, be set forth on the 1987 return. Inclusion of the \$14,617.00 on lines 4 and 23 of their 1987 return does not, in any way, result in an inference that petitioners received a refund of this amount.

D. The petition of Gerald A. Garber and Hana R. Garber is denied.

DATED: Troy, New York
April 13, 1995

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE